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Relevant Docket Entries

<i>Date</i>	<i>Proceedings</i>
12/ 6/71	Complaint in <i>Rosario</i> filed
12/ 9/71	Order to show cause for convocation of three judge Court in <i>Rosario</i> filed
12/15/71	Complaint in <i>Eisner</i> filed
12/16/71	Order to show cause for convocation of three judge Court in <i>Eisner</i> filed
12/17/71	Plaintiffs in <i>Eisner</i> and <i>Rosario</i> withdraw request for three judge Court. Parties agree to submit case to single District Judge for declaratory relief.
1/ 8/72	Answer in <i>Eisner</i> filed on behalf of Nassau County Board of Elections
1/10/72	Motions to dismiss in <i>Eisner</i> and <i>Rosario</i> filed by Attorney General
1/12/72	Memoranda of Law submitted by all parties
2/10/72	<i>Eisner</i> and <i>Rosario</i> cases ordered consolidated; decision and judgment declaring Section 186 unconstitutional announced by Chief Judge Mishler
2/17/72	Application for stay denied; motion for reargument denied by District Court; supplemental decision and order filed
2/17/72	Notice of Appeal to Court of Appeals filed
2/22/72	Stay granted by Second Circuit; argument on expedited appeal set for 2/24/72

Relevant Docket Entries

4/ 7/72 Second Circuit reverses District Court and up-holds constitutionality of Section 186

4/19/72 Supplemental petition for rehearing denied by Second Circuit

4/24/72 Application for stay pending filing of certiorari petition denied; application for rehearing in banc denied with Judges Oakes and Feinberg dissenting

4/24/72 Application for stay filed with Supreme Court; petition for writ of certiorari filed with Supreme Court; motion for summary reversal, or, in the alternative, expedited consideration on the merits filed in the Supreme Court

4/26/72 Temporary stay of Second Circuit opinion granted by Mr. Justice Marshall

5/30/72 Petition for certiorari granted; motion for summary reversal denied; motion for expedited relief denied 8-1 (Mr. Justice Stewart dissenting); application for stay of Second Circuit judgment denied 5-4 (Justices Douglas, Brennan, Stewart and Marshall dissenting)

Complaint in *Rosario v. Rockefeller***UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

[CAPTION OMITTED
IN 71 C 1573]

JURISDICTION

1. The jurisdiction of this Court is invoked under Title 28 U.S.C. 2201 et seq., this suit being authorized by Title 42 U.S.C. 1983. This is an action for a declaratory judgment and appropriate equitable relief to prevent the deprivation under color of the Election Law of the State of New York, of rights, privileges and immunities secured to the plaintiffs by the First, Fifth, Fourteenth and Twenty-Sixth Amendments to the Constitution of the United States. Jurisdiction is conferred upon this Court by 28 U.S.C. Section 1343 (3).

PARTIES

2. (a) Plaintiff, Pedro J. Rosario, is a new duly registered voter, eighteen years of age, who registered to vote on December 3rd, 1971 in County of Kings and enrolled that same day as a member of the Democratic Party.

(b) Plaintiff, William J. Freedman, is a new duly registered voter, who became twenty-one years of age on October 12, 1971, who registered to vote on December 3rd, 1971, in the County of Queens and enrolled that same day as a member of the Democratic Party.

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(c) Plaintiff, Karen Lee Gottesman, is a new duly registered voter, who is twenty-two years of age, who registered to vote on December 3rd, 1971, in the County of Queens and enrolled that same day as a member of the Democratic Party.

(d) Plaintiffs bring this action to challenge New York's statutory scheme regulating the participation of newly enrolled voters in primary elections.

3. (a) Defendant, Nelson Rockefeller, is the duly elected Governor of the State of New York.

(b) Defendant, John P. Lomenzo, is the duly appointed Secretary of State of the State of New York and is charged with general responsibility for the administration of the Election Laws of the State of New York.

(c) Defendants, Maurice J. O'Rourke, James M. Power, Thomas Malley and J. J. Duberstein, are the duly appointed Board of Elections in The City of New York and are charged with responsibility for the administration of the Election Law of the State of New York, in the City of New York.

4. The individual plaintiffs bring this action pursuant to Rule 23 (b) of the Federal Rules of Civil Procedure, on behalf of each individual plaintiff and on behalf of all others similarly situated, namely, all persons whose attempted enrollment as a member of a political party, pursuant to Sections 186 and 187 of New York's Election Law is frustrated and impeded by the operation of Section 186 of the Election Law, and Section 187 of the Election

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Law. There are questions of law and fact common to the class and the named plaintiffs will adequately protect the interest of the class.

5. Upon information and belief, at all times relevant to this Complaint, defendants have acted under color of Section 186 of New York's Election Law which forbids any enrollments in a political party filed subsequent to a general election from becoming effective until one week after the next annual general election. The net effect of Section 186 is to disqualify from participation in party primaries all persons who were not duly registered voters and enrolled party members at the preceding general election.

THE ISSUE

6. Each of these plaintiffs could have registered and enrolled on or before October 2nd, 1971, the last date of registration for the November 1971 elections. They each did not do so. When they enrolled on December 3rd, 1971, their enrollment ballots were put into a box in compliance with Section 186 and said enrollment box will not be opened under present law until after the 1972 General Elections. Each of them by operation of the Section is ineligible to participate in the local or Presidential party primaries in June 1972.

CAUSE OF ACTION

7. New York's statutory scheme governing the enrollment of voters in political parties unconstitutionally disqualifies plaintiffs, and members of the plaintiff class, from full participation in the electoral process by disenfranchis-

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ing newly enrolled voters from participation in party primaries in the absence of any compelling state justification for such an abridgment of the franchise.

WHEREFORE, plaintiffs pray that:

- (1) this Court convene a statutory United States District Court to hear and determine this action pursuant to Title 28 U.S.C. Sections 2281 and 2284;
- (2) the statutory United States District Court declare that the provisions of Section 186 of New York's Election Law are unconstitutional;
- (3) the statutory United States District Court grant plaintiffs appropriate equitable relief to assure their participation in the 1972 primary elections scheduled for June, 1972;
- (4) The statutory United States District Court grant such other and further relief as to it may seem just and proper.

Dated, Brooklyn, New York

December 6th, 1971.

SEYMOUR FRIEDMAN

26 Court Street

Brooklyn, New York 11242

Attorney for Plaintiffs

Complaint in *Eisner v. Rockefeller*

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

[CAPTION OMITTED
IN 71 C 1621]

I. JURISDICTION

1. This is a civil action brought pursuant to Title 42 U.S.C. Sec. 1983 to redress the deprivation under color of Section 186, Section 187 and Section 117 of the Election Law of the State of New York of rights, privileges and immunities secured to plaintiff by the First, Fourteenth and Twenty-Sixth Amendments to the Constitution of the United States and by the Voting Rights Act of 1970 (Title 42 U.S.C. Section 1973(a)(a)). Plaintiff seeks a declaratory judgment and injunctive relief pursuant to Title 42 U.S.C. 1983; Title 28 U.S.C. Section 2201 et seq. and Title 28 U.S.C. Sections 2281 and 2284, protecting plaintiff's constitutional rights to participate in the New York State Presidential Primary Election scheduled for June 20, 1972.

II. PARTIES

2. Plaintiff, Steven Eisner, is a duly registered voter in the County of Nassau who has been informed that he will be ineligible to participate in the New York State Presidential Primary Election scheduled for June 1972 because he was not registered to vote as an enrolled Democrat in the November 1971 general election.

Complaint in Eisner v. Rockefeller

3(a) Defendant, Nelson Rockefeller, is the duly elected Governor of the State of New York.

(b) Defendant, John P. Lomenzo, is the duly appointed Secretary of State of the State of New York and is charged with the duty of enforcing the provisions of New York's Election Law in connection with the Presidential Primary Election scheduled for June 20, 1972.

(c) Defendants, William D. Meissner and Marvin D. Cristenfeld, are the duly appointed Commissioners of Elections for Nassau County and are charged with the duty of enforcing the provisions of New York's Election Law in Nassau County.

4. Upon information and belief, at all times relevant hereto, defendants were acting under color of law of Sections 186 and 187 of New York's Election Law, which disqualify plaintiff from participating in the June 1972 Presidential Primary Election because he was not registered to vote as an enrolled Democrat in the November 1971 general elections, and Section 117 of New York's Election Law which precludes the issuance of absentee ballots in primary elections.

III. THE INCIDENTS AT ISSUE

5. Plaintiff, Eisner, first became eligible to vote on December 30, 1970, upon the attainment of his twenty-first birthday. He has resided at 134 Home Street, Valley Stream, New York for fifteen years.

Complaint in Eisner v. Rockefeller

6. On December 13, 1971, plaintiff, Eisner, duly registered to vote in Nassau County for the first time and completed an enrollment blank designating his affiliation with the Democratic Party. He was informed, however, that pursuant to Section 186 of New York's Election Law he will be ineligible to participate in the New York State Democratic Presidential Primary Election scheduled for June 1972 because his enrollment as a member of the Democratic Party will not become effective until November 1972.

7. Plaintiff, Eisner, is currently enrolled in his senior year at the University of Buffalo and consequently will not be physically present in Valley Stream on primary day. He was informed however, that even if he were eligible to vote in the June 1972 Presidential Primary, he would be ineligible for an absentee ballot because, pursuant to Section 117 of New York's Election Law, such ballots are not available for primary elections.

IV. CAUSES OF ACTION

8. Defendants' refusal, under color of Section 186 of New York's Election Law, to permit plaintiff to participate in the June 1972 Presidential Primary Election abridges his constitutional right to participate in the electoral process in violation of his rights under the First, Fourteenth and Twenty-Sixth Amendments to the Constitution of the United States and his rights under the Voting Rights Act of 1970 (Title 42 U.S.C. Section 1973(a)(a)).

9. Defendants' refusal, under color of Section 117 of New York's Election Law, to provide plaintiff with an ab-

Complaint in Eisner v. Rockefeller

sentee ballot in order to participate in the June 1972 Presidential Primary Election abridges his constitutional right to participate in the electoral process in violation of his rights under the First, Fourteenth and Twenty-Sixth Amendments to the Constitution of the United States and his rights under the Voting Rights Act of 1970 (Title 42 U.S.C. 1973(a)(a)).

WHEREFORE, plaintiff prays that this Court:

- 1) Convene a statutory three judge United States District Court to hear and determine this action and that such Court;
- 2) Declare that Section 186 of New York's Election Law violates the First, Fourteenth and Twenty-Sixth Amendments to the Constitution of the United States insofar as it precludes plaintiff from participating in the New York State Presidential Primary scheduled for June 1972.
- 3) Declare that Section 186 of New York's Election Law violates the Voting Rights Act of 1970 (Title 42 U.S.C. Section 1973(a)(a)) insofar as it precludes plaintiff from participating in the New York State Presidential Primary scheduled for June 1972.
- 4) Declare that Section 117 of New York's Election Law violates the First, Fourteenth and Twenty-Sixth Amendments to the Constitution of the United States insofar as it precludes the issuance of absentee ballots for the New York State Presidential Primary Election.
- 5) Declare that Section 117 of New York's Election Law violates the Voting Rights Act of 1970 (Title 42 U.S.C.

Complaint in Eisner v. Rockefeller

Section 1973(a)(a)) insofar as it precludes the issuance of absentee ballots for the New York State Presidential Primary Election.

- 6) Grant appropriate equitable relief, if necessary, enforcing plaintiff's right to participate in the New York State Presidential Primary scheduled for June 20, 1972.
- 7) Grant such other and further relief as to the Court may seem just and proper.

BURT NEUBORNE, Esq.
BRUCE J. ENNIS, Esq.
PAUL G. CHEVIGNY, Esq.
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

Dated: December 15, 1971

**Order to Show Cause Why Three Judge Court
Should Not Be Convened in Rosario**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED
IN 71C 1573]

Upon the annexed complaint of Pedro J. Rosario, William J. Freedman and Karen Lee Gottesman, and upon due deliberation after a reading thereof, it is hereby

ORDERED, that the defendants show cause before this Court in the Courthouse, located at Tillary and Jay Streets, in the Borough of Brooklyn, City of New York, State of New York, on the 17th day of December, 1971, at 9:30 A.M. or as soon thereafter as counsel can be heard in Courtroom of the said Court, why an Order should not be made directing the convening of a Special Three Judge Court to hear and determine the allegations and issues raised in the complaint.

Service of a copy of this Order, with a copy of the complaint upon the Attorney General of the State of New York personally, on or before December 10th, 1971, at 1:00 P.M. and upon the named Commissioners of Elections herein by mail by posting on or before December 8th, 1971, shall be deemed proper and sufficient service. No previous application has been made on this case for this relief.

Dated, Brooklyn, New York,
December 6th, 1971.

JACOB MISHLER
United States District Judge

**Order to Show Cause Why Three Judge Court
Should Not Be Convened in *Eisner***

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED
IN 71C 1621]

Upon the annexed complaint and the affidavit of Burt Neuborne, it is hereby:

ORDERED, that defendants show cause at a motion term of this Court, at Courtroom 5 of the United States District Courthouse for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, on Friday, December 17, 1971, at 10 o'clock in the forenoon, or as soon thereafter as counsel may be heard why an order should not be made convening a three judge United States District Court to hear and determine this matter; and it is

FURTHER ORDERED, that service of a true copy of this order and the papers upon which it was granted upon the Attorney General of the State of New York and the Nassau County Attorney on or before Dec. 16, 1971 at 3:00 P.M. shall be due and sufficient service hereof.

Dated: December 16, 1971
Brooklyn, New York

JACOB MISHLER
U.S.D.J.

Affidavit of Burt Neuborne in Support of Motion

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

BURT NEUBORNE, being duly sworn, deposes and says:

1) I am an attorney for the plaintiff herein and I make this affidavit in support of plaintiff's motion to convene a three judge United States District Court herein.

2) In *Bachrow v. Rockefeller*, 71 C 930, this Court recognized that the impact of Section 186 of New York's Election Law raised substantial constitutional questions requiring the convocation of a three judge Court. The merits were not reached in *Bachrow* because the plaintiffs were found to lack standing to raise the constitutional issues.

However, the plaintiff herein, Steven Eisner, possesses unquestionable standing.

3) Accordingly, plaintiff respectfully requests the convocation of a three judge Court to hear and determine whether plaintiff may lawfully be denied an opportunity to participate in the June Presidential Primary.

Affidavit of Burt Neuborne in Support of Motion

- 4) Plaintiff is prepared, however, to forego his request for injunctive relief if defendants are prepared to represent that they will abide by a declaratory judgment. In that event, plaintiff is prepared to submit his constitutional claim to a single Federal District judge, without the necessity of convening a three judge Court.
- 5) No prior application for the same or for similar relief has been made to any Court.

BURT NEUBORNE

[Jurat omitted in printing.]

**Answer in Eisner Submitted on Behalf of Commissioners
of Elections of Nassau County**

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

[CAPTION OMITTED
in 71C 1621]

The defendants, WILLIAM D. MEISNER, sued herein as WILLIAM D. MEISSNER, and MARVIN D. CRISTENFELD, Commissioners of Elections for Nassau County, appearing herein by their attorney, JOSEPH JASPAN, County Attorney of Nassau County, for their Answer to the Complaint herein, allege as follows:

First: Deny that they have any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered "5" of the complaint.

Second: Upon information and belief deny each and every allegation contained in paragraph numbered "6" of the complaint, except to state that plaintiff Eisner did register to vote on December 13, 1971 at the Nassau County Board of Elections and as a separate procedure, filled out an enrollment blank which was placed in a sealed box which will be opened on the Tuesday following the next general election.

*Answer in Eisner on Behalf of Commissioners of Elections,
Nassau County*

Third: Deny that they have any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered "7" of the complaint.

Fourth: Upon information and belief, deny each and every allegation contained in paragraphs numbered "8" and "9" of the complaint.

*As and for a First, Separate and Affirmative Defense,
Defendants, William D. Meisser and Marvin D. Cristen-
feld, Commissioners of Elections for Nassau County,
Allege, Upon Information and Belief, as Follows:*

Fifth: Under New York Election Law §§3-a and 149, all persons designated for uncontested offices or positions for a primary election shall be deemed nominated or elected thereto, as the case may be, without any ballot being cast. At the time of plaintiffs' claim, no contests exist. The plaintiffs are not deprived of an opportunity to cast a ballot in any primary until such a primary contest comes into being.

*As and for a Second, Separate and Affirmative Defense,
Defendants, William D. Meisser and Marvin D. Cristen-
feld, Commissioners of Elections for Nassau County,
Allege, Upon Information and Belief, as Follows:*

Sixth: This Court does not have jurisdiction over New York State's primary election procedures. Neither the First, Fifth, Fourteenth or the Twenty-Sixth Amendments

*Answer in Eisner on Behalf of Commissioners of Elections,
Nassau County*

of the United States Constitution confer the power on this Court to rule upon a case in the aforesaid procedure.

WHEREFORE, the defendants, William D. Meisser, sued herein as William D. Meissner, and Marvin D. Cristenfeld, Commissioners of Elections for Nassau County, respectfully request that this complaint be dismissed.

JOSEPH JASPA^N

County Attorney

Attorney for Defendants:

WILLIAM D. MEISSE^R and

MARVIN D. CRISTENFELD,

*Commissioners of Elections for
Nassau County*

County Executive Building

One West Street

Mineola, New York 11501

by J. KEMP HANNON,

Deputy County Attorney

Motion to Dismiss in *Eisner* and *Rosario* Submitted
on Behalf of Attorney General of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED

in 71C 1573]

71C 1621

STEVEN EISNER, on his own behalf and on behalf
of all others similarly situated,

Plaintiffs,

—against—

NELSON ROCKEFELLER, Governor of the State of New York;
JOHN P. LOMENZO, Secretary of State of New York;
WILLIAM D. MEISSNER and MARVIN D. CRISTENFELD, Com-
missioners of Elections for Nassau County,

Defendants.

NOTICES OF MOTIONS

SIRS :

PLEASE TAKE NOTICE, upon the orders to show cause
signed December 6, 1971 in *Rosario v. Rockefeller, et al.*
and December 16, 1971 in *Eisner v. Rockefeller, et al.*, the
complaints and upon all the prior proceedings had herein,
the undersigned will move this Court on January 10, 1971
at 9:30 o'clock in the forenoon in Courtroom No. 5, United
States Courthouse, 225 Cadman Plaza East, Brooklyn, New

Motion to Dismiss in Eisner and Rosario

York, for an order pursuant to the Federal Rules of Civil Procedure, Rule 12(b)(1) and (6) and 12(c) dismissing the complaints upon the ground that the Court lacks jurisdiction thereof, and further that they fail to state a claim upon which relief may be granted, as against the State defendants and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York

January 10, 1971

nunc pro tunc

Yours, etc.

LOUIS J. LEFKOWITZ

*Attorney General of the State of
New York*

*Attorney for Rockefeller and
Lomenzo and Pro Se pursuant
to Executive Law § 71.*

By: A. SETH GREENWALD
Assistant Attorney General

Office & P. O. Address

80 Centre Street

New York, New York 10013

Tel. (212) 488-3396

(To all attorneys of record.)

**Opinion of Chief Judge Mishler Declaring
Section 186 Unconstitutional**

February 10, 1972

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 71-C-1573

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE GOTTESMAN, individually and on behalf of all others similarly situated,

Plaintiffs,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LORENZO, Secretary of State of The State of New York, MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Defendants.

No. 71-C-1621

STEVEN EISNER, on his behalf and on behalf of all others similarly situated,

Plaintiffs,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LORENZO, SECRETARY of State of The State of New York, WILLIAM D. MEISSNER and MARVIN D. CHRISTENFELD, Commissioner of Elections for Nassau County,

Defendants.

Opinion of Chief Judge Mishler

Plaintiffs in these class actions represent voters who were qualified to register to vote and to enroll in a political party on or before November 2, 1971, the date of the last general election. They failed to do so.

In December, 1971 each named plaintiff appeared at an office of the Board of Elections in the county in which he or she resided. Each registered, demanded and received an enrollment blank. Each completed the enrollment blank in which he or she declared that he or she was in general sympathy with the principles of the political party of choice, and intended to support the nominees of that party in the general election. The completed enrollment blanks were then deposited in a locked enrollment box and kept sealed as mandated under Section 186 of the Election Law of the State of New York. They will remain sealed until the Tuesday following the next general election on November 7, 1972.¹

The actions, brought pursuant to 42 U.S.C. §1983, claim that Section 186 of the Election Law of the State of New York² is a violation of the First, Fourteenth and Twenty-

¹ The Court consolidated the actions as provided in Rule 42A.

² Plaintiff Eisner has withdrawn his complaint and prayer for relief with respect to §117, dealing with absentee ballots, inasmuch as litigation is pending on that issue elsewhere.

§ 186. *Opening of enrollment box and completion of enrollment*

All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year. Such box shall then be opened by the board of elections and the blanks contained therein shall be removed therefrom by the board, and the names of the party designated by each voter under such declaration, provided such party continues to be a party, as defined in this law shall be entered by the board, opposite the name of such voter in the appropriate column of the two copies of the register containing enrollment numbers for the election district in which such voter resides. The enrollment blanks marked by voters, who enrolled before a

Opinion of Chief Judge Mishler

Sixth Amendments to the Constitution and the Voting Rights Act of 1965 (42 U.S.C. §1973) and the 1970 Amendments thereto (U.S.C. §1973 aa).

Plaintiffs seek a declaratory judgment declaring Section 186 of the Election Law of the State of New York unconstitutional.*

The June primary in the State of New York will be a contest for party nominations for State Senator, State Assemblyman, United States Congressmen, United States Senators and delegates to the national nominating conventions of the major political parties. The delegates to the national nominating conventions will in turn choose candidates of the major political parties for President and Vice-President.

New York has a closed primary system in which only duly enrolled members of a party may vote in that party's primary election. The enrollment box system provided in

central or veterans' absentee registration board shall at the same time be opened by the board of elections and the names of the party designated by each such voter shall likewise be entered by the board, provided such party continues to be a party, as defined in this law. If cross marks are found in more than one of the circles or if no cross marks are found in any of the circles of any enrollment blank, the voter who used the enrollment blank thus deficient shall not be deemed to be enrolled, and words indicating the reason why such enrollment is not transcribed shall be entered opposite the name of such voter in such copies of the register in the column reserved for the entry of party enrollments. When all of the enrollments shall be transcribed from the blanks to the register, the board of elections shall make a certificate upon the form printed in such registers, to the effect that it has correctly and properly transcribed the enrollment indicated on the blank of each voter to such registers. Such enrollment shall be complete before the succeeding first day of February in each year. L.1949, ch.99; amended L.1955, c.41, eff. March 7, 1955.

* Plaintiffs originally moved for the convening of a three Judge Court, and thereafter withdrew the motion for a three Judge Court.

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the statutory scheme of the New York Election Law effectively deprives plaintiffs and the members of their class who are otherwise qualified by reasons of age, citizenship and residence in the State of New York of the privilege of voting in the June, 1972 primary, running for party office,* or signing designating petitions for candidates wishing to enter the primary.

I. EQUAL PROTECTION

The right to vote, whether denominated the right of suffrage or simply "the franchise," has long been held by the Supreme Court to be one of the basic rights of citizenship. As the Court recognized in *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362 (1964): "Almost a century ago, in *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, the Court referred to 'the political franchise of voting' as 'a fundamental political right, because preservative of all rights.' 118 U.S., at 370, 6 S.Ct., at 1071." (377 U.S. at 561-62, 84 S.Ct. at 1981).

The scrutiny to which any infringement of the right to vote is subject under the Equal Protection Clause of the Fourteenth Amendment has become increasingly severe in the past decade. In *Reynolds v. Sims*, *supra*, the Court was faced with a challenge to the apportionment of the two houses of the Alabama Legislature. The challenge was founded on the alleged over-representation of rural districts, and a resulting violation of equal protection guarantees. The Court there said:

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and

* Party officials are also elected in the primary election.

Opinion of Chief Judge Mishler

unimpaired manner is preservative of other basic civil and political rights, *any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.* (377 U.S. at 561-62, 84 S.Ct. at 1381) [Emphasis supplied.]

In *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775 (1965), the Court dealt with a challenge to a Texas constitutional provision prohibiting any member of the armed forces of the United States who moved to Texas during the course of his military duty from ever voting in any election in that state as long as he remained a member of the armed forces. After invalidating that provision on equal protection grounds the Court continued:

We deal here with matters close to the core of our constitutional system. 'The right . . . to choose,' *United States v. Classic*, 313 U.S. 299, 314, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368, that this Court has been so zealous to protect, means, *at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State.* (380 U.S. at 96, 855 at 780) [Emphasis supplied.]

In *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079 (1966), the Court, after characterizing the right to vote as a fundamental right, went on to advise that

We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, *classifications which might invade or restrain them must be closely scrutinized and care-*

Opinion of Chief Judge Mishler

fully confined. [Citations omitted.] These principles apply here. (383 U.S. at 670, 86 S.Ct. at 1083) [Emphasis supplied.]

As can easily be seen, the increasing rigor to which state statutory and constitutional provisions were subjected in *Reynolds*, *Carrington* and *Harper*, was at variance with the traditional equal protection test. That test, as enunciated in the classic definition given by the Court in *McGowan v. State of Maryland*, 366 U.S. 420, 81 S.Ct. 1101 (1961), is much less stringent. The Court in *McGowan* defined the traditional test as follows:

Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State Legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.* (366 U.S. at 425-26, 81 S.Ct. at 1105) [Emphasis supplied.]

At the October Term of 1968, the Supreme Court continued to enlarge the divergence between the treatment to be accorded most state statutes when attacked as violating the Equal Protection Clause and the treatment to be accorded those statutes specifically affecting the right to vote. In *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5 (1968), the Court was presented with a challenge to a set of Ohio

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statutes which made it extremely difficult for any party other than the Democratic or Republican Party to achieve the status of an established party and to have its name and its candidates placed on the ballot in the general election. The statutory scheme was attacked not only as a denial of the equal protection of the laws, but also as in violation of the First Amendment freedom of association. In holding the statutes involved unconstitutional, the Court rested its decision both on the infraction of the Equal Protection Clause and on the infringement of First Amendment rights. The test applied by the Court, however, was not whether any merely rational basis could be imagined to justify the enactment of the statutes, but whether or not there was any *compelling* state interest to justify their existence.

The Court drew support for the use of this test from a case which had not involved the right to vote, but was solely concerned with First Amendment rights of association. The Court in *Williams* stated:

In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling State interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' *NAACP v. Button*, 371 U.S. 415, at 438, 83 S.Ct. 328, at 341 (1963). (393 U.S. at 31, 89 S.Ct. at 11).

The Court concluded by saying that "The State has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote and to associate," and ". . . the totality of the Ohio restrictive

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laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause." (393 U.S. at 31 and 34, 89 S.Ct. at 11 and 12).

The opinion in *Williams v. Rhodes*, *supra*, left one in some doubt as to whether the compelling state interest test would be applied to cases involving only voting rights and having no First Amendment overtones. Later in that same Term, however, the Court decided *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886 (1969), and did much in the *Kramer* opinion to clarify its view of the appropriate test to be used when statutes involving the right to vote are challenged on equal protection grounds.

In *Kramer*, the challenged statute restricted the vote in local school board elections to those otherwise qualified voters who were either parents of children attending schools within the local public school system or were owners or lessees of real property within the school district.⁵ The plaintiff, a registered voter, resided with his parents and was thus prevented from voting in the local school elections. No First Amendment issues were involved in the case. The Court held that the compelling state interest test applied to the voting restrictions in issue, and, finding no such interest, voided the statute.

In arriving at its decision, the Court in *Kramer* made a distinction between two types of restrictions on the franchise and held that the compelling state interest test would only be applied in cases involving statutes constituting the latter type of restriction. The Court said:

At the outset, it is important to note what is *not* at issue in this case. The requirements of §2012 that

⁵ New York Education Law §2012 (McKinney 1969).

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school district voters must (1) be citizens of the United States, (2) be *bona fide* residents of the school district, and (3) be at least 21 years of age, are not challenged.

Appellant agrees that the States have the power to impose reasonable citizenship, age, and residency requirements on the availability of the ballot. Cf. *Carrington v. Rash*, 380 U.S. 89, 91, 85 S.Ct. 775, 777, 13 L.Ed.2d 675 (1965); *Pope v. Williams*, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904).

The sole issue in this case is whether the *additional* requirements of §2012—requirements which prohibit some district residents who are otherwise qualified by age and citizenship from participating in district meetings and school board elections—violate the Fourteenth Amendment's command that no state shall deny persons equal protection of the laws. . . . Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. [Footnote omitted.] Therefore, if a challenged state statute grants the right to vote to some *bona fide* residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. (395 U.S. at 625-27, 89 S.Ct. 1888-90). [Emphasis in original.]

It is evident from the Court's opinion in *Kramer* that once a state has imposed basic voting requirements of citizenship, age, and residency, all further requirements (which by their nature must be viewed as restrictions)

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must of necessity be supported by a compelling state interest. This in effect places the burden of proof on the state, the reverse of the situation where the rational basis test is applied. The basic requirements of citizenship, age and residency, are to be tested, when they are challenged, by the traditional, "rational relation" test, used in garden-variety equal protection cases.

Kramer provides us with a relatively simple guide to the test to be used in examining any state statute dealing with voting rights when that statute is challenged as in violation of the Equal Protection Clause. The explicit theory propounded in *Kramer* serves to rationalize the results in the prior voting rights cases. The requirement of rural residency in order to have a fully weighted vote in *Reynolds*, the requirement of being either a civilian or a resident of Texas prior to entering military service in order to vote in *Carrington*, and the requirement of a voting fee or poll tax in *Harper*, are all "additional" requirements within the meaning of that term as used in *Kramer*. See also *City of Phoenix v. Kolodziejksi*, 399 U.S. 204, 90 S.Ct. 1990 (1970); *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897 (1969).

One of the questions presented by the instant case is whether or not the compelling state interest test is applicable in an examination of the statute herein attacked. In order to decide this question this court must first decide whether the right to vote protected in *Kramer*, *Williams*, *Carrington*, *Harper*, and *Reynolds*, includes the right to vote in a primary election. The defendants here claim that it is not so included, arguing that a primary is an internal party matter, and further, that a party is a purely private organization.

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This view of primary elections, and, indeed, of the entire process of selecting candidates to be voted for at general elections, is belied by case law. It is true that primary elections and party affairs in general were once so regarded. In *Newberry v. United States*, 256 U.S. 232, 41 S.Ct. 469 (1921), the Supreme Court was faced with a challenge to the constitutionality of what was then the Federal Corrupt Practices Act. (Section 8 of the Act as then in force.) (Section 8, Act of June 25, 1910, c. 392, 36 Stat. 822-24, as amended by Act of August 19, 1911, c. 33, Section 2, 37 Stat. 25-29.)

The plaintiffs-in-error in *Newberry*, had been found guilty in the lower court of violating Section 8, in that, among other things, they had used or expended more than the allowed amount in causing the named plaintiff-in-error to receive the Republican nomination for Senator in the State of Michigan at the primary election held on August 27, 1918. The Court found that Congress exceeded the power granted in Article I, Section 4, of the Constitution, to determine "the times, places and manner of holding elections for Senators and Representatives. . . ." since the word "elections" did not include primaries. The Court held:

The Seventeenth Amendment, which directs that Senators be chosen by the people, neither announced nor requires a new meaning of election, and the word now has the same general significance as it did when the Constitution came into existence—final choice of an officer by the duly qualified electors. *Hawke v. Smith*, 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871. Primaries were then unknown. Moreover, they are in no sense elections for an office, but merely methods by

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which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors. General provisions touching elections in Constitutions or statutes are not necessarily applicable to primaries—the two things are radically different. (256 U.S. at 250, 415 at 472 (1921).)*

Twenty years later the Court reversed itself. In *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031 (1941), Louisiana election officials had been indicted under what are now Sections 241 and 242 of Title 18 U.S.C. They were accused of falsifying ballots at a primary election involving the choice of federal candidates. A challenge to the indictment was made and sustained in the lower court on the ground that Congress had no power to regulate primary elections. The Supreme Court reversed, distinguishing *Newberry* on the grounds previously adverted to, and concluding that:

Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, Section 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a

* Mr. Justice McKenna concurred in the opinion, as written, only on the ground that the statute under consideration had been enacted prior to the Seventeenth Amendment. He specifically reserved the question of the power of Congress under that Amendment. The other four Justices would have upheld the power of Congress to regulate primary elections.

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party primary which invariably, sometimes or never determines the ultimate choice of the representative." (313 U.S. at 318, 61 S.Ct. at 1039). [Emphasis supplied.]

Finally, in *Smith v. Allwright*, 321 U.S. 469, 64 S.Ct. 757 (1944), the Supreme Court found itself able to say that "It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution." (321 U.S. at 661-62, 64 S.Ct. at 764).

The right to vote in primary elections is indeed part of the "right to vote," incursions into which are to be judged according to the classifications and standards set up in *Kramer*. It is clear that the right to vote protected by Article I, Section 2 of the Federal Constitution includes voting in all elections, both primary and general, dealing with the choice of federal legislators.

However, the provisions of the Equal Protection Clause of the Fourteenth Amendment apply not only to a state's discrimination in the allocation of federal rights, but also to a state's discrimination in the allocation of any other rights which the state may see fit to create. In this regard, it is to be noted that the State of New York has included the right to vote in primary elections in the rights protected by Article I, Section 1 of the New York State Constitution. As construed by the Court of Appeals in the case of *In Re Terry*, 203 N.Y. 293, 96 N.E. 931 (1911), Article I, Section 1 of the State Constitution secures to the people the right to participate in the nominating process:

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The franchise of which no "member of this state" may be deprived is not only the right of citizens who possess the constitutional qualifications to vote for public officers at general and special elections, but it also includes the right to participate in the several methods established by law for the selection of candidates to be voted for. (203 N.Y. at 295, 96 N.E. at 932).

Defendants protest any reliance upon *Classic, supra*, or *Allwright, supra*, as support for the proposition that primary elections are to be considered in the same light as general elections when construing the bounds of the right to vote. They argue that the fact that all of these cases arose in what were effectively single party states vitiate their applicability to primary elections in states which do not have single party systems. In response to this it must be said that the Supreme Court was well aware of the actual nature of primary elections in Texas and Louisiana, and it specifically rejected any notion that its decisions were to be applied solely in those situations where a primary was actually a general election. As stated previously, the Court in *Classic, supra*, would have its holding apply either "[w]here the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice. . . ." [Emphasis supplied.] The Court further stated that the right to vote in a primary is protected "whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative." (313 U.S. at 318, 61 S.Ct. at 1039).

That primary elections are "an integral part of the procedure of choice" in the State of New York is evident

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from the extensive statutory provisions regulating such elections. Primaries in New York are conducted by Public officials and financed from public funds. Their conduct, including all means by which candidates are placed on the primary ballot, is regulated by the State. Although the primary elections in New York State as a whole cannot be said to "effectively control the choice . . .", the fact is that they do effectively control the choice in many areas of New York State which are for all intents and purposes one party areas. However, it is unnecessary for this Court to rely on the second leg of the *Classic* statement quoted in the paragraph above, as it is evident that primaries are an integral part of the procedure of choice in New York and that this suffices.

Applying the standards of *Kramer*, then, it is clear that the voting requirement embodied in §186 of the New York Election Law is a requirement neither of age, nor of citizenship, nor of residence and is thus an additional requirement which is subject to examination under the compelling state interest test. Section 186 in effect requires voters who have met the basic state requirements of age, citizenship, and residence, to have enrolled in a political party prior to the last general election preceding the primary in which they desire to vote, in order to vote in that primary.

The state interest propounded by the defendants in support of the enrollment box system is New York's interest in insuring the integrity of its political parties and in preventing inter-party raiding. Defendants argue that, absent the enrollment box provisions of §186, voters not in basic sympathy with the principles of a specific party would find it easy to organize and enroll in that party in large numbers before a primary so as to be able to

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vote in that party's primary and subvert its basic interests.

It is true that such raiding is possible. See *Matter of Zuckman v. Donohue*, 191 Misc. 399, 79 N.Y.S.2d 169 (Sup. Ct.), aff'd 274 A.D. 216, 80 N.Y.S.2d 698 (3rd Dept.) aff'd without opinion 298 N.Y. 627, 81 N.E.2d 371, 86 N.Y.S.2d — (1948); *Matter of Werbel v. Gernstein*, 191 Misc. 274, 78 N.Y.S.2d 440 (Sup. Ct. 1948); *Matter of Newkirk*, 144 Misc. 765, 259 N.Y.S. 434 (Sup. Ct. 1931).¹

However, where a law is subject to the compelling state interest test it "will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin v. Florida*, 379 U.S. 184, 196, 85 S.Ct. 283, 290 (1964). Assuming, *arguendo*, that the protection of party integrity is a "permissible state policy," no showing has been made that the enrollment box system is necessary to its accomplishment.

The state has other, less drastic, means to accomplish its ends if it wishes to protect minority parties and small geographic subdivisions of major parties. Section 332 of the New York Election Law provides that the party enrollment of a voter may be challenged by any fellow party member and cancelled by a Justice of the State Supreme Court upon the determination of the Chairman of the County Committee of the party in the county in which

¹ Each of these cases involved the attempted takeover of a party organization by adherents of another party. In each case, they were almost successful. Nevertheless, it is to be noted that the enrollment box system was in effect throughout the period during which these cases arose, and that that system in no way prevented hundreds of determined voters from organizing prior to the last general election and changing their party enrollments so as to be able to "raid" the other party. All of these cases arose when the enrollments of the raiders were challenged by bona fide party members.

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the challenged voter is enrolled that the voter is not in sympathy with the principles of the party.

That such procedure is highly effective, even on extremely short notice before a primary, is attested to by the results in the three state court cases cited above, *Zuckerman*, *Werbel*, and *Newkirk*. Each of those cases involved challenges to the enrollment of party members. Each case involved an attempted takeover of one party by members of another. Challenges in each of the three cases were successful.

Such a proceeding, then, is sufficient to protect the permissible interests of the state. The challenge procedure may involve the expenditure of more time and effort on the part of state officials, but New York may not "deprive a class of individuals of the vote because of some remote administrative benefit to the State." *Carrington v. Rash, supra*, 380 U.S. at 96, 85 S.Ct. at 780.

The explicit and comprehensive criminal sanctions for various violations of the elective franchise provided for in Article 16 of the Election Law, §420 et seq., further buttress the state's ability to protect the integrity of its political parties and election procedures.

Defendants also argue that plaintiffs have waived their constitutional right to vote in the primaries, or are estopped from asserting it, by reason of their failure to enroll prior to the last general election. In dealing with fundamental constitutional rights like the right to vote, the Supreme Court has said: "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." (Footnote omitted). *Brady v. United States*, 397 U.S. 742, at 748, 90 S.Ct. 1463, at 1469 (1970). See also *Brookhart v. Janis*,

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384 U.S. 1, 4, 86 S.Ct. 1245 (1966); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938).*

Bearing in mind the principles of these cases and the importance of the rights in question, this Court cannot say that there has been any waiver in this case. Plaintiffs remain free to assert their rights in court, and are not barred from doing so by any asserted waiver or estoppel.

II. FIRST AMENDMENT

The right to vote is inextricably tied to the right of free expression and the related right of free association. The right to vote is meaningless unless accompanied by the opportunity to exchange ideas and opinions.

Plaintiffs further contend that the "waiting period" imposed by New York's statutory scheme between their initial attempts to enroll in a political party and their final acceptance as party members violates their right to freely associate with the party of their choice for the advancement of their political aims and ideals. As such, they maintain, the enrollment box system violates the First Amendment.

The Court agrees. The system is an unconstitutional infringement by the state of rights guaranteed by the First and Fourteenth Amendments to the Constitution. Absent a compelling state interest, no state may impose onerous burdens on the right of individuals to associate

* Although these principles were announced in criminal cases, it can hardly be said that the rights of voting, free expression, and free association are any less fundamental and sacred than the rights reserved to those accused of crimes. These rights ought not lightly to be considered forfeited. It is perhaps most important that a right not need burdensome administrative renewal when the critical nature of a current situation sparks a citizen to speak out. See, e.g. *Beare v. Smith*, 321 F. Supp. 1100 (1970) (Three Judge Court).

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for the advancement of political beliefs and the right of qualified voters to cast their votes effectively. *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5 (1968).

The effect of New York's enrollment laws is to postpone plaintiffs' right to associate with members of the political party of their choice and to participate in the affairs of that party. They are denied the right to vote in primary elections, to sign designating petitions, to become regular designees of the party for public office, or to become candidates for party office, until the enrollment box is unlocked and they are enrolled. The citizen who moves into another county after a general election, or who switches party loyalty or who only later decides to take an interest in party affairs is denied the right to associate with others of the same political views for an unreasonable length of time.

Several formulations of the test that alleged infringements of First Amendment rights must satisfy to uphold their constitutionality have been advocated or used by the courts. These include "balancing" of interests, the absolute standard, "less drastic means," and the "compelling interest" test.

"Balancing" would involve weighing the governmental interest in the purpose of the statute in question against the First Amendment rights alleged to be infringed. In *United States v. Robel*, 389 U.S. 258, 88 S.Ct. 419 (1967), however, the Supreme Court expressly declined to use such a test. In striking down an overbroad federal statute, the Court stated:

We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are

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at stake. The task of writing legislation which will stay within those bounds has been committed to Congress. Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a "less drastic" impact on the continued vitality of First Amendment freedoms." *Shelton v. Tucker, supra.*" 88 S.Ct. at 425-26, 389 U.S. 267-69, and see also fn. 20.

Nor is it certain that *Robel, supra, Boorda v. Subversive Activities Control Board*, 421 F.2d 1142 (D.C. Cir. 1969), cert. den. 397 U.S. 1042 (1970), and *Williams v. Rhodes, supra* (concurring opinion of Mr. Justice Douglas) have held that direct restraints on free association are absolutely invalid. It appears that *Robel* was applying the "less drastic means" test of *Shelton v. Tucker*, 364 U.S. 479, 81 S.Ct. 247 (1960). In overturning a state statute requiring teachers to disclose their every associational tie, the *Shelton* court stated:

In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose. 364 U.S. 479, 488, 81 S.Ct. 247, 252. (emphasis supplied, footnote omitted).

Another line of cases has settled upon the "compelling state interest" test whenever it is alleged that state action

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infringes First Amendment rights protected through the Due Process Clause of the Fourteenth Amendment. In *NAACP v. Alabama*, a state statute requiring the NAACP to produce its records including the names of its members was held unconstitutional. In determining whether Alabama had demonstrated an interest in obtaining the information sufficient to justify the deterrent effect which the disclosures might have on associational rights, the Court said, "Such a '... subordinating interest of the State must be compelling,' *Sweezy v. New Hampshire*, 354 U.S. 234, 265, 77 S.Ct. 1203, 1219, 1 L.Ed.2d 1311 (concurring opinion)." 357 U.S. 449, 463, 78 S.Ct. 1163, 1172 (1958).

This development was continued in *Bates v. City of Little Rock*, 361 U.S. 516, 80 S.Ct. 412 (1960), and *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328 (1963), and culminated in *Williams v. Rhodes*, *supra*. In the latter case, Ohio election laws were challenged that made it very difficult for a new political party to be placed on the state ballot to choose electors pledged to particular candidates for President and Vice President. In language that aptly describes the present case also, Justice Douglas stated:

Cumbersome election machinery can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote. The totality of Ohio's requirements has those effects. 393 U.S. 23, 39, 89 S.Ct. 5, 15 (concurring opinion).

Speaking for the Court, Mr. Justice Black said:

In the present situation the state laws place burdens on two different, although overlapping, kinds of right

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—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank high among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment.⁶ And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.⁷ 393 U.S. 23, 30-31, 89 S.Ct. 5, 10 (footnotes omitted).

In determining whether Ohio had the power to place substantially unequal burdens on both the right to vote and the right to associate, the Court reaffirmed that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." (citing *NAACP v. Alabama, supra*).⁸

Thus, First Amendment freedoms are within the state's power to limit and regulate only when the state has a compelling state interest that is served by that regulation. Furthermore, there must be a "substantially relevant connection" between the state's compelling interest and the means that are chosen to effect the regulation. *Shelton v.*

⁶ Although Justice Harlan specifically limited his concurrence to the proposition that Ohio's statutory scheme violated the basic right of political association assured by the First Amendment which is protected against state infringement under the Due Process Clause of the Fourteenth Amendment, it now appears that the Supreme Court has fixed upon the compelling state interest test to test alleged infringements of the right to vote and of First Amendment rights on either Due Process or Equal Protection grounds.

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Tucker, supra, 364 U.S. 449, 485, 81 S.Ct. 247, 250. This is essentially saying that the State must utilize the least drastic means available to effect its legitimate interest. If the state fails to prove either that its interest is compelling or that the means chosen are the least drastic means possible, the regulation must fall as an overbroad infringement of the First Amendment right.

As outlined above, the Court finds that the state has failed to prove that it has a compelling interest in the values that the enrollment box system was designed to protect, and that even if it had such a compelling state interest, it has not utilized the least drastic means. The challenge procedures and the criminal sanctions outlined in the Election Law are certainly less drastic, and there is no reason to believe that they would not protect whatever interest the State of New York claims to have in the maintenance of "party integrity."

III. THE VOTING RIGHTS ACT OF 1965 AND THE 1970 AMENDMENTS

Section 1973aa-1 of the Voting Rights Act of 1965, (Pub. L. 89-110, 79 Stat. 437, 42 U.S.C.A. §1973, and the Amendments of 1970, Pub. L. 89-110, Title II, §201, as added Pub. L. 91-285, §6, 84 Stat. 315, 42 U.S.C.A. §1973aa) provides:

(c) No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision;

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(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President or Vice President in such election;¹⁰

Defendant's argument that the Voting Rights Act has no application to "primary voting for presidential nominating conventions," is answered in the text of the Act.¹¹ 42 U.S.C. §19731(c)(1) provides:

(c)(1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any

¹⁰ The Twenty-sixth Amendment to the Constitution has also brought about a change in voter qualifications by lowering the voting age in all elections to 18. It does not appear that New York has as yet enacted statutory provisions to put these changes into effect, but compliance with the age requirement and the residency requirement (for the actual presidential elections) is evidently proceeding by means of instructions from the Secretary of State to the election boards.

¹¹ The legislative history shows that the Act was intended to apply to primary elections and particularly elections of delegates to party conventions. House Report No. 439, in explanation of the Definitions Section of the Voting Rights Act [42 U.S.C. §19731(c)(1)] states:

Clause (1) of this subsection contains a definition of the term "vote" for purposes of all sections of the act. The definition makes it clear that the act extends to all elections—Federal, State, local, primary, special or general—and to all actions connected with registration, voting, or having a ballot counted in such elections. The definition also states that the act applies to elections of candidates for "party" offices. Thus, for example, an election of delegates to a State party convention would be covered by the act. . . . U.S. Code Cong. & Admin. News 2464 (1965).

The Conference Committee adopted the House version of Sub-section 14(c)(1). *Id.* at 2582.

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primary, special, or general election, including, but not limited to, registration, listing pursuant to this sub-chapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election. (Emphasis supplied).

As stated earlier, delegates to the national nominating conventions will be elected in New York's June primary. These delegates are the direct link between the interests and opinions of the voters in the primary and the national candidates and platform selected at the national nominating conventions. In order for a voter to effectively participate in the selection process, he must be able to cast his vote in the primary also. It seems intuitively obvious to even the most casual observer that to deny or encumber the right to participate in primary elections is to restrict the right to participate in an integral and essential part of the electoral process.

It also needs little explanation that the waiting period mandated by the enrollment box system before an enrollment can become effective is a durational residency requirement.¹² This residency requirement may vary in duration from one to eleven months, depending on the time of year the enrollment blank is filled out and put in the box (registration and signing of enrollment blanks are closed during the thirty days before and after the general election). It is a durational residency requirement imposed

¹² It is noted that absentee balloting is not available in primary elections.

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in addition to the ninety days residence required to vote in a general election.¹³

The seven months' additional residence required of those voters who would be otherwise qualified to vote in the June primary constitutes a durational residence requirement as a precondition to voting for President and Vice President in excess of the thirty days allowed by the Voting Rights Act. As thus applied, the law is invalid. Const. Art. VI.

It might be noted that the constitutionality of the 1970 Amendments was challenged in *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260 (1970). A divided (5-4) Court found that the 18-year-old vote provisions of the Amendments are constitutional and enforceable insofar as they pertain to federal elections and unconstitutional and unenforceable insofar as they pertain to state and local elections. The literacy test provisions were unanimously upheld, and the Court, by a vote of 8-1, held that Congress could set residency requirements and provide for absentee balloting in elections for presidential and vice presidential electors.

However, it is clear that the Supreme Court did not pass on the application of the Amendments, by the literal terms of the Act, to a primary election at which the delegates to the national nominating conventions would be elected. This Court must assume the constitutionality of the Act and its amendments until it is decided otherwise.

¹³ Section 150 provides in part that

"[a] qualified voter is a citizen who is or will be on the day of election twenty-one years of age or over, and shall have been a resident of this state, and of the county, city or village for three months next preceding an election and has been duly registered in the election district of his residence. . . ." See footnote 10, *supra*.

*Opinion of Chief Judge Mishler***IV. SUMMARY OF PRIOR PROCEEDINGS**

The plaintiff initially moved for the convening of a three-judge court pursuant to 28 U.S.C. §2281, *et seq.* The defendants moved to dismiss the complaints pursuant to Rules 12(b) and 12(c) of the Rules of Civil Procedure. As previously noted, the plaintiffs withdrew the application to convene a three-judge court.

V. CONCLUSION

Defendants' motion to dismiss pursuant to Rules 12(b) and 12(c) is denied. Judgment is granted in favor of the plaintiffs and against the defendants declaring §186 of the Election Law of the State of New York unconstitutional.

The Clerk is ordered to enter judgment accordingly.

JACOB MISHLER
U.S.D.J.

Judgment of the District Court**UNITED STATES DISTRICT COURT****EASTERN DISTRICT OF NEW YORK**

[CAPTIONS OMITTED
in 71C 1573 and 71C 1621]

These actions having been consolidated by the court and the court having by memorandum of decision dated this day determined that §186 of the Election Law of the State of New York contravenes the First and Fourteenth Amendments to the Constitution and is violative of the Voting Rights Act of 1965 as amended, insofar as it pertains to the June 1972 primary to be held in the State of New York, it is

ORDERED, ADJUDGED and DECREED that plaintiffs have judgment against the defendants declaring §186 of the Election Law of the State of New York unconstitutional and violative of the Voting Rights Act of 1965 as amended.

Dated at Brooklyn, New York, this 10th day of February, 1972.

LEWIS ORGEL
Clerk of the Court

Approved and Ordered that
it be entered

JACOB MISHLER
U.S.D.J.

**Decision and Order of District Court Denying
Motions for Stay and Reargument**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 71-C-1573

PEDRO J. ROSARIO, *et al.*,

Plaintiffs,

—against—

NELSON ROCKEFELLER, etc., *et al.*,

Defendants.

No. 71-C-1621

STEVEN EISNER, etc.,

Plaintiffs,

—against—

NELSON ROCKEFELLER, etc., *et al.*,

Defendants.

MEMORANDUM OF DECISION AND ORDER

February 17, 1972

The defendants, by order to show cause, move to reargue the decision of this court and the order entered thereon made and dated February 10, 1972 on the grounds of (1) lack of jurisdiction of a single district judge to declare

Decision and Order of the District Court

§186 unconstitutional, and (2) abuse of discretion in granting declaratory judgment.

The court did not overlook the issue now raised. The decision made reference to the withdrawal of the motion for the convening of a three judge district court and noted that plaintiffs had withdrawn their application for that relief. Because of what had transpired, as will be hereinafter described, the court assumed that the parties agreed that a single judge district court would pass on the issue of the unconstitutionality of §186 of the Election Law of the State of New York.

The Rosario complaint prayed for (1) convening a three-judge district court, (2) declaring §186 unconstitutional and (3) granting "plaintiffs appropriate equitable relief to assure their participation in the 1972 primary elections scheduled for June 1972".

On December 6, 1971, the day of the filing of the complaint, an order was signed directing the defendants to show cause why a three-judge district court should not be convened pursuant to 28 U.S.C. §2281. The motion was returnable on December 17, 1971. In the meantime and on December 15th, Eisner filed a complaint praying that the court declare §§117 and 186 of the Election Law of the State of New York unconstitutional and praying for appropriate equitable relief to enforce "plaintiff's right to participate in the New York State Presidential Primary scheduled for June 20, 1972". A motion was made for a three-judge district court returnable on December 17, 1971. Defendants served a notice of motion to dismiss the complaint for lack of jurisdiction and failure to state a claim upon which relief may be granted. [Rules 12(b)(1), 12(b)(6) and 12(c)].

Decision and Order of the District Court

On the return day of all the motions, i.e., December 17, 1971, there was discussion in open court among Seymour Friedman, attorney for plaintiffs Rosario, et al., Burt Neuborne, attorney for plaintiff Eisner, et al., A. Seth Greenwald, an Assistant Attorney General of the State of New York, J. Kemp Hannon, an attorney representing the Nassau County Board of Elections and J. Lee Rankin (by Mr. Gensler), representing The City of New York, concerning the advisability of convening a three-judge district court in the light of the time schedule for appellate review prior to June 20, 1972.

In *Bachrow v. Rockefeller*, 71-C-930, a three judge district court on September 8, 1971 dismissed a challenge to §186 for mootness.¹ The same lawyers participated in *Bachrow*. The undersigned was a member of the three judge district court.

Since Christmas vacations were about to commence and a delay in convening a three judge district court was a possibility, all the lawyers agreed that a more expeditious appellate review could be realized if the determination on the constitutionality of §186 were determined by the undersigned as a single district court judge. Thereupon the plaintiffs agreed to withdraw their request for injunctive relief. The Court wrote an order to that effect which stated that the action is "solely one for declaratory judg-

¹ In its memorandum of decision, the court, noting the difficulty in securing a determination, cited the dissenting opinions in *Hall v. Beals*, 396 U.S. 45, 90 S.Ct. 20 (1969) in the following language:

"Although the time periods involved may make it difficult to secure a decision and review of any given situation before a specific election takes place (see the dissenting opinions in *Hall v. Beals, supra*), it does not seem that a diligent plaintiff would find such a task impossible."

Decision and Order of the District Court

ment". Messrs. Friedman, Greenwald and Gersler signed their consent to that order.²

Thereafter briefs were served and filed by all the parties. The constitutional points were argued in the briefs. None of the parties argued the question of jurisdiction. The defendants now argue that the stipulation does not "amount to a consent on the part of the defendants above to jurisdiction or the propriety of the granting of a sweeping declaratory judgment by a single judge in a case of this nature." (Defendants' Memorandum of Law, p. 1)

The parties cannot confer jurisdiction on this court. The power of the court to act cannot therefore be based upon the consent of the defendants. Rather, the court has recounted the history of this proceeding as an answer to the defendants in charging an abuse of discretion in deciding this case as a single district court judge. The defendants' claim of an abuse of discretion in granting a declaratory judgment as provided in 28 U.S.C. §2201 is rejected in view of the conduct of the defendants' counsel described herein at length.

² The consent reads as follows:

"

12/17/71

On consent of the parties hereto the prayer for relief is amended by eliminating paragraph (3) of the prayer for relief and the action is solely one for declaratory judgment.

So ORDERED

s/ Jacob Mishler
U.S.D.J.

Consent

s/ Seymour Friedman

J. Lee Rankin, Corp. Counsel

s/ by Att Gersler

Louis J. Lefkowitz by

s/ A. Seth Greenwald

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The power of a single-judge district court to determine constitutional questions is stated in *Rosado v. Wyman*, 397 U.S. 397, 402; 90 S.Ct. 1207, 1212-13, as follows:

"Jurisdiction over federal claims, constitutional or otherwise, is vested exclusively or concurrently, in the federal district courts. Such courts usually sit as single-judge tribunals."

The district court is a court of limited jurisdiction. Jurisdiction to decide questions involving the deprivation of civil rights granted under the Constitution is found in 28 U.S.C. §1343.*

The power to decide constitutional questions in the first instance is in the federal district court. Congress has seen fit to limit that power by denying a single judge the right to issue "an interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . ." (28 U.S.C. §2281).

The defendants would extend that limitation to an action for declaratory judgment where the effect of that judgment would be identical to that of an injunction. *Rosado v. Wyman*, 304 F.Supp. 1350, 1352 (E.D.N.Y. 1969), [Weinstein, D.J.].

* The pertinent portion of 28 U.S.C. §1343 recites:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. June 25, 1948, c. 646, 62 Stat. 932."

Decision and Order of the District Court

Chief Judge Lumbard's concurring opinion in *Rosado v. Wyman*, 414 F.2d 170, 184 (2d. Cir. 1970), made the following observation with reference to the same issue:

"That the state statute could be held unconstitutional in a declaratory ruling by the single judge seems settled. See ALI Study of the Division of Jurisdiction Between State and Federal Courts 245 (Tent. Draft No. 6, 1968), recommending that such a declaratory judgment requires a three-judge court but noting: [T]he requirement is here extended to cases seeking only a declaratory judgment, a remedy which was unknown in 1910. Three judges are not now needed in such a case. Cf. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154-55, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963); *Flemming v. Nestor*, 363 U.S. 603, 606-607, 80 S.Ct. 1367, 4 L.Ed. 2d 1435 (1960).

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554 (1963) defined the power of a single district court judge to declare a federal statute unconstitutional.* In *Mendoza-Martinez*, the plaintiff brought an action in the district court seeking to have §401(j) of the Nationality Act of 1940 declared unconstitutional. That act deprived a citizen, who remained out of the country for the purpose of avoiding the draft, of his citizenship. The Court said:

"The present action, which in form was for declaratory relief and which in its agreed substance did not contemplate injunctive relief, involves none of the dangers to which Congress was addressing itself. The

* 28 U.S.C. §2282 places the same limitation on the power of a single district court judge with reference to the enforcement, operation or execution of any Act of Congress as 28 U.S.C. §2281 places on the power with relation to any state statute.

Decision and Order of the District Court

relief sought and the order entered affected an Act of Congress in a totally non-coercive fashion. There was no interdiction of the operation at large of the statute. It was declared unconstitutional, but without even an injunctive sanction against the application of the statute by the Government to Mendoza-Martinez. Pending review in the Court of Appeals and in this Court, the Government has been free to continue to apply the statute. That being the case, there is here no conflict with the purpose of Congress to provide for the convocation of a three-judge court whenever the operation of a statutory scheme may be immediately disrupted before a final judicial determination of the validity of the trial court's order can be obtained. Thus there was no reason whatever in this case to invoke the special and extraordinary procedure of a three-judge court." 372 U.S. at 155, 83 S.Ct. at 560-61.*

Were the court to accept the defendants' argument, then the result would be that no single judge district court would have the power to entertain an action for a judgment declaring any statute unconstitutional. The restraining effect of a declaratory judgment which defendants describe would be present in every case to a greater or lesser de-

* The Circuits have generally understood *Mendoza-Martinez* to approve the power of a single district judge to declare statutes unconstitutional. See, *Merced Rosa v. Herrero*, 423 F.2d 591 (1st Cir. 1970); *United States v. Southern Ry. Co.*, 380 F.2d 49 (4th Cir. 1967); *Wilson v. Gooding*, 431 F.2d 855 (5th Cir. 1970); *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970); *Sellers v. Regents of the University of California*, 432 F.2d 493 (9th Cir. 1970); But See *Jeannette Rankin Brigade v. Chief of the Capitol Police*, 421 F.2d 1090 (D.C. Cir. 1969) [Bazelon, C.J., dissenting]. See criticism of *Mendoza-Martinez* in *Currie, The Three-Judge District Court in Constitutional Litigation*, 32 U. Chicago L. Rev. 1 (1964).

Decision and Order of the District Court

gree, since statutes are of a wide, general application and must necessarily have an effect beyond the parties to the litigation.

The Congress may further limit the power of a single district judge by denying them the right to declare state or federal statutes unconstitutional. It has not seen fit to do so.

This court has the power to declare §186 unconstitutional and finds it appropriate to exercise such power in this case.

The motion to re-argue is in all respects denied, and it is

So ORDERED.

JACOB MISHLER
U.S.D.J.

**Notice of Appeal in Rosario Filed on Behalf
of Attorney General of New York**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED
IN 71 C 1573]

SIRS:

NOTICE is hereby given that Nelson Rockefeller, Governor of the State of New York and John P. Lomenzo, Secretary of State of the State of New York, hereby appeals to the United States Court of Appeals for the Second Circuit from a judgment entered February 10, 1972 declaring § 186 of the Election Law of New York unconstitutional and from each and every part of said judgment.

Dated: New York, New York

February 17, 1972

Notice of Appeal in Rosario on Behalf of Attorney General

Yours, etc.,

Louis J. LEFKOWITZ
*Attorney General of the
State of New York
Attorney for Defendants
Rockefeller and Lomenzo Pro Se
Pursuant to Executive Law § 71
Office and P. O. Address
80 Centre Street
New York, New York 10013*

By: A. SETH GREENWALD
*Assistant Attorney General
488-3396*

To:

SEYMOUR FRIEDMAN, Esq.
26 Court Street
Brooklyn, New York 11201

J. LEE RANKIN
*Corporation Counsel
Municipal Building
New York, New York 10007*

Notice of Appeal in *Eisner* Filed on Behalf
of Attorney General of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED
IN 71 C 1621]

SIRS:

NOTICE is hereby given that Nelson Rockefeller, Governor of the State of New York and John P. Lomenzo, Secretary of State of the State of New York, hereby appeals to the United States Court of Appeals for the Second Circuit from a judgment entered February 10, 1972 declaring § 186 of the Election Law of New York unconstitutional and from each and every part of said judgment.

Dated: New York, New York
February 17, 1972

Yours, etc.,

Notice of Appeal in Eisner on Behalf of Attorney General

LOUIS J. LEFKOWITZ
*Attorney General of the
State of New York
Attorney for Defendants
Rockefeller and Lomenzo Pro Se
Pursuant to Executive Law § 71
Office and P. O. Address
80 Centre Street
New York, New York 10013*

By: A. SETH GREENWALD
*Assistant Attorney General
488-3396*

To:

BURT NEUBORNE
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011

JOSEPH JASPAK
Nassau County Attorney
County Executive Building
Mineola, New York 11501

Att: J. KEMP HANNON

Notice of Appeal in *Eisner* Filed on Behalf of
Commissioners of Elections for Nassau County

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED
IN 71 C 1621]

SIRS:

NOTICE is hereby given that William D. Meisser and Marvin D. Cristenfeld, Commissioners of Elections for the Board of Elections of Nassau County, hereby appeal to the United States Court of Appeals for the Second Circuit from a judgment entered February 10, 1972, declaring § 186 of the Election Law of New York unconstitutional and from each and every part of said judgment.

Dated: Mineola, New York
February 18, 1972

*Notice of Appeal in Eisner on Behalf of Commissioners
of Elections, Nassau County*

Yours, etc.

JOSEPH JASPER

*County Attorney of Nassau County
Attorney for Defendants*

*William D. Meisser and Marvin D.
Cristenfeld, Commissioners of Elec-
tions for Nassau County*

Nassau County Executive Building
Mineola, New York 11501

By **J. KEMP HANNON**

*Deputy County Attorney
(516) 535-3603*

To:

HON. LOUIS J. LEFKOWITZ

Attorney General of the State of New York

Attorney for Defendants

Rockefeller and Lomenzo Pro Se

Pursuant to Executive Law § 71

80 Centre Street

New York, N. Y. 10013

BURT NEUBORNE, Esq.

New York Civil Liberties Union

Attorney for Plaintiff

84 Fifth Avenue

New York, N. Y. 10011

**Order of Second Circuit Staying Decision of
District Court and Scheduling an Expedited Appeal**

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of February, one thousand nine hundred and seventy-two.

[CAPTIONS OMITTED]

It is hereby ordered that the motion made herein by counsel for the appellants by notice of motion dated February 18, 1972, for a stay and for a preference be and it hereby is granted.

It is further ordered that the argument of the appeal is set for Thursday, February 24, 1972; that all parties may file papers in typewritten form and that the appellant shall file three copies of all necessary parts of the record.

A. DANIEL FUSARO
Clerk

B e f o r e :

HON. HAROLD R. MEDINA
HON. J. EDWARD LUMBARD
HON. WILLIAM H. MULLIGAN
Circuit Judges

**Opinion of Second Circuit Holding Section 186
Constitutional
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Nos. 632, 633—September Term, 1971.

(Argued February 24, 1972 Decided April 7, 1972.)

Docket Nos. 72-1182-83

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE GOTTESMAN, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

—v—

NELSON ROCKEFELLER, Governor of the State of New York,
JOHN P. LORENZO, Secretary of State of the State of New York,

Defendants-Appellants,

MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLEE and J. J. DUBERSTEIN, constituting the Board of Elections in The City of New York,

Defendants.

—————

STEVEN EISNER, on his own behalf and on behalf of all others similarly situated,

Plaintiffs-Appellees,

—v—

NELSON ROCKEFELLER, Governor of the State of New York;
JOHN P. LORENZO, Secretary of State of New York,
WILLIAM D. MEISSNER and MARVIN D. CHRISTENFELD, Commissioners of Elections for Nassau County,

Defendants-Appellants.

—————

Opinion of Second Circuit

B e f o r e :

LUMBARD, MANSFIELD and MULLIGAN,

Circuit Judges.

Appeal from a decision in the Eastern District of New York, Mishler, J., declaring New York Election Law §186 unconstitutional on grounds that it violated plaintiffs' First and Fourteenth Amendment rights and that it was in conflict with 42 U.S.C. §1973aa-1(d).

Reversed.

SEYMOUR FRIEDMAN, Brooklyn, New York, for Plaintiffs-Appellees Pedro J. Rosario, William J. Freedman and Karen Lee Gottesman, et al.

A. SETH GREENWALD, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York and Irving Galt, on the brief), for Defendants-Appellants Nelson Rockefeller and John P. Lomenzo and Pro Se pursuant to New York Executive Law §71.

BURT NEUBORNE, New York Civil Liberties Union, Brooklyn, New York (Arthur Eisenberg, on the brief), for Plaintiffs-Appellees Steven Eisner, et al.

J. KEMP HANNON (Joseph Jaspan, County Attorney of Nassau County, Mineola, New York, on the brief), for Defendants-Appellants William D. Meissner and Marvin D. Christenfeld.

Opinion of Second Circuit

LUMBARD, Circuit Judge:

Defendants below, New York State officials charged with enforcing section 186 of the New York Election Law which provides that voters in primary elections must have been enrolled in the party prior to the previous general election, appeal from Chief Judge Mishler's decision in the Eastern District declaring section 186 unconstitutional as a violation of plaintiffs' rights under the First and Fourteenth Amendments and the federal Voting Rights Act, 42 U.S.C. §1973, as amended 42 U.S.C. §1973aa. We reverse.

Section 186 is part of New York's comprehensive regulation of its electoral processes and, in particular, of its party primary elections. By law only enrolled party members can vote in their party's primary. New York Election Law §201. Section 186 is designed to ensure the integrity of the closed primary and provides that enrollment in a party for the purpose of voting in a primary election must take place prior to the general election previous to the primary.¹ The

1 Section 186 provides:

§186. *Opening of enrollment box and completion of enrollment*

All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year. Such box shall then be opened by the board of elections and the blanks contained therein shall be removed therefrom by the board, and the names of the party designated by each voter under such declaration, provided such party continues to be a party, as defined in this law shall be entered by the board, opposite the name of such voter in the appropriate column of the two copies of the register containing enrollment numbers for the election district in which such voter resides. The enrollment blanks marked by voters, who enrolled before a central or veterans' absentee registration board shall at the same time be opened by the board of elections and the names of the party designated by each such voter shall likewise be entered by the board, provided such party continues to be a party, as defined in this law. If cross marks are found in more than one of the circles or if no cross marks are found in any of the circles of any enrollment blank, the voter who used the enrollment blank thus deficient shall

Opinion of Second Circuit

theory behind the statute is that such early enrollment will discourage "raiding," i.e., voters of one party fraudulently designating themselves as voters of another party in order to determine the results of the raided party's primary.

Plaintiffs here, all registered voters, failed to enroll as party members prior to the November 1971 general elections. The effect of section 186 is to exclude them from voting in the 1972 primary elections. Invoking the jurisdiction of the federal courts under 42 U.S.C. §1983, 28 U.S.C. §1343(3), §2281, and §2284, plaintiffs sought the convening of a three-judge court and requested declaratory and injunctive relief against the enforcement of section 186. Subsequently, they dropped their demand for injunctive relief, and, concomitantly, their request for a three-judge court.² The district court granted the requested de-

not be deemed to be enrolled, and words indicating the reason why such enrollment is not transcribed shall be entered opposite the name of such voter in such copies of the register in the column reserved for the entry of party enrollments. When all of the enrollments shall be transcribed from the blanks to the register, the board of elections shall make a certificate upon the form printed in such registers, to the effect that it has correctly and properly transcribed the enrollment indicated on the blank of each voter to such registers. Such enrollment shall be complete before the succeeding first day of February in each year.

² Defendants have argued that the district court had no power to refuse to convene a three-judge court even though plaintiffs had withdrawn their demand for injunctive relief. We disagree. The Supreme Court has said that section 2281 is not "a measure of broad social policy to be construed with great liberality, but . . . an enactment technical in the strict sense of the term and to be applied as such." *Phillips v. United States*, 312 U.S. 246, 251 (1941). Following this doctrine the Court has carefully differentiated between suits in which declaratory relief is requested and a three-judge court is not appropriate and those in which injunctive relief is requested and a three-judge court is required. *Mitchell v. Donovan*, 398 U.S. 427 (1970); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Since plaintiffs abandoned their claim for injunctive relief at the district court level and prior to the trial, the district judge quite properly determined the issue. See *Merced Boss v. Herrero*, 423 F.2d 591, 593 (1st Cir. 1970).

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claratory relief on three grounds: that section 186 violated plaintiffs' Fourteenth Amendment rights to equal protection because raiding can be equally well or better prevented by New York Election Law §332 which provides for direct challenges to allegedly fraudulent enrollments, yet under which plaintiffs would not be kept from voting; that section 186 infringed the plaintiffs' First Amendment rights of association with other party members, yet advanced no compelling state interest, or failed to do so by the least drastic means; and that section 186 was in direct conflict with the federal Voting Rights Act §1973aa-1(d) which provides "each State shall provide by law for the registration . . . of all duly qualified residents . . . not later than thirty days immediately prior to any presidential election." We disagree.

The political parties in the United States, though broad-based enough so that their members' philosophies often range across the political spectrum, stand as deliberate associations of individuals drawn together to advance certain common aims by nominating and electing candidates who will pursue those aims once in office. The entire political process depends largely upon the satisfactory operation of these institutions and it is the rare candidate who can succeed in a general election without the support of the party. Yet the efficacy of the party system in the democratic process—its usefulness in providing a unity of divergent factions in an alliance for power—would be seriously impaired were members of one party entitled to interfere and participate in the opposite party's affairs. In such circumstances, the raided party would be hard-pressed to put forth the candidates its members deemed most satisfactory. In the end, the chief loser would be the public.³

³ New York has a particular interest in preventing raiding. In addition to the major parties, Democrat and Republican, two minority parties,

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Section 186 is part of New York's scheme to minimize the possibility of such debilitating political maneuvers. Designed to prevent primary crossover votes cast only to disrupt orderly party functioning, the statute requires that enrollment in the party be completed by a date sufficiently prior to the primary to decrease the likelihood of raiding. The Supreme Court has made clear that "prevention of [electoral] fraud is a legitimate and compelling government goal." *Dunn v. Blumstein*, 40 U.S.L.W. 4269, 4274 (March 21, 1972). "[A] State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies. *Bullock v. Carter*, 40 U.S.L.W. 4211, 4215 (Feb. 24, 1972). And a candidacy determined by the votes of non-party members for purposes antagonistic to the functioning of the primary system is, in practical effect, a fraudulent candidacy. Given the importance of orderly party primaries to the political process, we hold that the prevention of "raiding" is a compelling state interest.⁴

Conservative and Liberal, are established throughout the state and usually present a full slate of candidates in the general election. Yet as there are only 107,000 enrolled Conservatives and 109,000 enrolled Liberals as opposed to 2,950,000 enrolled Republicans and 3,565,000 enrolled Democrats, successful raiding of these minority parties would present little difficulty on a state-wide basis absent §186.

⁴ Restrictions on the exercise of the franchise, dealing as they do with the fundamental rights of voting and association have been closely scrutinized by the courts; e.g., *Dunn v. Blumstein*, 40 U.S.L.W. 4269 (March 21, 1972); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *William v. Rhodes*, 393 U.S. 23 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964); and primaries as well as general elections have been subjected to this exacting scrutiny, e.g., *Bullock v. Carter*, 40 U.S.L.W. 4211 (Feb. 24, 1972); *Smith v. Allwright*, 321 U.S. 469 (1944); *United States v. Classic*, 313 U.S. 299 (1941).

Applying this standard to our review of section 186, we find that the statute advances a compelling state interest and that it does so in a manner calculated to impinge minimally on First and Fourteenth Amendment rights.

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Moreover, section 186 is carefully designed to infringe minimally on First and Fourteenth Amendment rights. The statute works indirectly to its end of having only voters in general sympathy with the party vote in that party's primary. By requiring enrollment some seven to nine months prior to the primary and also prior to the general election, it takes full advantage of the facts that long-range planning in politics is quite difficult and that neither politician nor voter wishes to give the impression that he is deliberately engaging in fraud. Thus the notion of raiding, its potential disruptive impact, and its advantages to one side are not likely to be as apparent to the majority of enrolled voters nor to receive as close attention from the professional politician just prior to a November general election when concerns are elsewhere as would be true during the "primary session," which, for the country as a whole, runs from early February until the end of June. Few persons have the effrontery or the foresight to enroll as say, "Republicans" so that they can vote in a primary some seven months hence, when they full well intend to vote "Democratic" in only a few weeks. And, it would be the rare politician who could successfully urge his constituents to vote for him or his party in the upcoming general election, while at the same time urging a cross-over enrollment for the purposes of upsetting the opposite party's primary. Yet the operation of section 186 requires such deliberate inconsistencies if large-scale raiding were to be effective in New York. Because of the statute, it is all but impossible for any group to engage in raiding. Allowing enrollment any time after the general election would not have the same deterrent effect on raiding for it would not put the voter in the unseemly position of asking to be enrolled in one party while at the same time intending to vote immediately for another.

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Plaintiffs have argued, however, that even if the effectiveness of section 186 as a deterrent on raiding be established, still the statute must be struck down for it also keeps from voting in a primary the registrant who has only inadvertently failed to enroll prior to the general election and who has no intention of "raiding" one of the parties. Plaintiffs argue that section 332 of the Election Law which allows for a direct challenge to enrollees would be sufficient to accomplish the antiraiding purpose of section 186 and would, at the same time, allow the nonraiding late enrollee to vote in the primary. While it is true that section 186 and section 332 are aimed at the same evil of raiding, it is obvious that the use of 332 to prevent raiding would be far too cumbersome to have any deterrent effect on raiding in a primary. *Cf. Bullock v. Carter*, 40 U.S.L.W. 4211, 4214 (Feb. 24, 1972).

Section 332 is a narrowly drawn statute appropriate for striking from the enrollment rolls only one name at a time. Each such challenge requires a full judicial inquiry, with its high cost in money, time and manpower for the challenging party. Its efficacy, even in the single case is not clear for proof of a man's allegiance to one party or another is often difficult to secure. Unlike proof of residence, for which objective evidence, e.g., ownership of a dwelling, car registration, or a driver's license, is easily at hand, proof of allegiance to one party or another demands inquiry into the voter's mind. The very great majority of voters have no closer contact with their political party than pulling the lever or marking the ballot in the voting booth. In the absence of the availability of evidence regarding a voter's party preference and faced with large-scale raiding, party officials relying only on section 332 would be virtually impotent. By contrast, section 186 has a broad deterrent effect. The burden of change is placed upon the raider not the party and the

Opinion of Second Circuit

statute requires the cross-over at a particularly difficult time. In requiring that the state use to a proper end the means designed to impinge minimally upon fundamental rights, the Constitution does not require that the state choose ineffectual means. We think section 186 is a proper means to safeguard a valuable state interest.⁵

We are supported in our conclusion by the Supreme Court's recent decision in *Lippitt v. Cipollone*, 40 U.S.L.W. 3334 (Jan. 17, 1972). There the Court affirmed without opinion a decision of the Northern District of Ohio declaring constitutional Ohio Rev. Code §3513.191 which provides "[n]o person shall be a candidate for nomination or election at a party primary if he voted as a member of a different political party at any primary election within the next preceding four calendar years." Holding the statute constitutional the lower court found that it preserved "the integrity of all political parties and membership therein" by "prevent[ing] 'raiding' of one party by members of another party and [by] preclud[ing] candidates from '... altering their political party affiliations for opportunistic reasons.'" *Lippitt v. Cipollone*, 71-667 (N.D. Ohio, Nov. 5, 1971). The Supreme Court's affirmation indicates beyond dispute that the prevention of raiding is a compelling state interest and that a reasonable extended period of time before an enrollment can be changed is a proper means to halt this practice.⁶

5 New York does allow post-general election enrollment in certain cases. Section 187 of the Election Law allows late enrollment if, for example, the enrollee came of age after the past general election or if he was ill during the enrollment period. The import of section 187 is that New York is not opposed to later enrollment per se.

6 Defendants have argued that the Supreme Court's dismissal for want of a substantial federal question of a case ostensibly raising the same issues as the instant case, *Jordan v. Meissner*, 40 U.S.L.W. 3398 (Feb. 23, 1972), is controlling in this litigation. However, in *Jordan v. Meissner*, the New York Attorney General argued to the Court that the plaintiff

Opinion of Second Circuit

Plaintiffs' final argument is that section 186 is in direct conflict with 42 U.S.C. §1973aa-1(d) which provides: "each State shall provide by law for the registration . . . of all duly qualified residents . . . not later than thirty days immediately prior to any presidential election . . ." Plaintiffs argue that "presidential election" includes presidential primary. We disagree.

Section 1973aa-1(d) was passed as part of the Voting Rights Act of 1970. The statute itself makes no reference to primary elections speaking only of "voting for the offices of President and Vice President," §1973aa-1(a), or "vot[ing] for the choice of electors for the President and Vice-President," §1973aa-1(d) and the more usual meaning of "presidential election" is the quadrennial November election rather than the party primaries. On its face, then, the statute is not applicable to primary elections. The legislative history is silent on whether section 1973aa-1(d) was intended to apply to primaries. 1970 U.S. Cong. Code and Admin. News 3277, 3285. However, at the same time Congress enacted section 1973aa-1(d), it also passed into law section 1973bb reducing the voting age to eighteen in federal, state and local elections. See *Oregon v. Mitchell*, 400 U.S. 112 (1970). In so doing, Congress specifically addressed itself to "voting in any primary or in any election." 42 U.S.C. §1973bb. The deliberate inclusion of the word "primary" here coupled with its absence in section 1973aa is further indication that Congress was not dealing with primaries in section 1973aa. We conclude that section 1973aa has no application to this case.

Reversed.

Jordan had failed to utilise the provisions of section 187 of the New York Election Law under which he could have enrolled in a party after the general election in order to participate in the primary election. Section 187, however, allows post-general election enrollment only in narrowly-defined circumstances and none of the plaintiffs here has this alternate route of enrollment presently available to him.

Judgment of Second Circuit Reversing District Court
in Rosario

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals,
in and for the Second Circuit, held at the United States
Courthouse in the City of New York, on the seventh day of
April one thousand nine hundred and seventy-two.

Present:

HON. J. EDWARD LUMBARD,
HON. WALTER R. MANSFIELD,
HON. WILLIAM H. MULLIGAN,

Circuit Judges.

[CAPTION OMITTED]

Appeal from the United States District Court for the
Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO
Clerk

Judgment of Second Circuit Reversing District Court
in *Eisner*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals,
in and for the Second Circuit, held at the United States
Courthouse in the City of New York, on the seventh day of
April one thousand nine hundred and seventy-two.

Present:

HON. J. EDWARD LUMBARD,
HON. WALTER R. MANSFIELD,
HON. WILLIAM H. MULLIGAN,

Circuit Judges.

[CAPTION OMITTED]

Appeal from the United States District Court for the
Eastern District of New York.

This cause came on to be heard on the transcript of record
from the United States District Court for the Eastern
District of New York, and was argued by counsel.

On CONSIDERATION WHEREOF, it is now hereby ordered,
adjudged, and decreed that the judgment of said District
Court be and it hereby is reversed in accordance with the
opinion of this court with costs to be taxed against the
appellees.

A. DANIEL FUSARO
Clerk

**Order Denying Motion to Stay Mandate and
Denying Petition for Rehearing in *Eisner***

**UNITED STATES COURT OF APPEALS
SECOND CIRCUIT**

[CAPTION OMITTED]

A petition for rehearing together with a motion in the alternative to stay the issuance of the mandate pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellees,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

J. EDWARD LUMBARD
WALTER R. MANSFIELD
WILLIAM H. MULLIGAN

April 24, 1972

**Order Denying Supplemental Petition for Rehearing
in *Eisner***

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

[CAPTION OMITTED]

A supplemental petition for a rehearing having been filed herein by counsel for the appellees,

Upon consideration thereof, it is

Ordered that said supplemental petition be and it hereby is DENIED.

J. EDWARD LUMBARDE
(per WRM)
WALTER R. MANSFIELD
WILLIAM H. MULLIGAN
U. S. Circuit Judges

Dated: April 19, 1972

**Order Denying Petition for Rehearing in Banc
With Judges Feinberg and Oakes Dissenting**

**UNITED STATES COURT OF APPEALS
SECOND CIRCUIT**

[CAPTION OMITTED]

A petition for rehearing and supplemental petition for rehearing both containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellees, a poll of the judges in regular active service having been taken at the request of such a judge, and there being no majority in favor thereof.

Upon consideration thereof, it is

Ordered that said petitions be and they hereby are denied. Judges Feinberg and Oakes dissent.

HENRY J. FRIENDLY
Chief Judge

April 24, 1972

**Temporary Stay of Second Circuit Judgment
Issued by Mr. Justice Marshall**

SUPREME COURT OF THE UNITED STATES

No. A-1126
(No. 71-1371)

PEDRO J. ROSARIO, *et al.*,

Petitioners,

—v.—

NELSON ROCKEFELLER, GOVERNOR OF THE
STATE OF NEW YORK, *et al.*

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the judgment of the United States Court of Appeals for the Second Circuit in cases Nos. 72-1182 and 72-1183 be, and the same is hereby, temporarily stayed until the matter can be considered by the full Court.

THURGOOD MARSHALL
*Associate Justice of the Supreme
Court of the United States.*

Dated this 26th day of April, 1972.

Order Granting Certiorari But Denying Motion for Summary Reversal, Expedited Consideration and a Stay

The petition for a writ of certiorari is granted. The motion for summary reversal or, in the alternative, for expedited consideration on the merits is denied. Mr. Justice Stewart would expedite consideration on the merits.

The application for stay, presented to Mr. Justice Marshall and by him referred to the Court, is denied. Mr. Justice Douglas, Mr. Justice Brennan, Mr. Justice Stewart and Mr. Justice Marshall would grant the stay.

The motion of Lawyers for McGovern for leave to file a brief, as *amicus curiae*, is granted.

71-1371

COPY

Supreme Court of the United States

Supreme Court of the United States

No. 71-1371 ---- October Term, 1972

Pedro J. Rosario, et al.,

Petitioners,

v.

Milton Rockefeller, Governor of the State
of New York, et al.

ORDER ALLOWING CERTIORARI Filed May 30 -----, 19 72.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second ----- Circuit is granted.